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Proposed State-Defense Draft of May 8, 1953

DRAFT INSTRUCTION TO AMERICAN EMBASSY IN TOKYO

No.

To the

Officer in Charge of the American Mission,  
Tokyo.

*from  
defense  
5/12*

The Secretary of State refers to the note of April 14, 1953 from the Japanese Minister of Foreign Affairs to the Ambassador concerning the revision of Article XVII of the Administrative Agreement upon the coming into force of the NATO Status of Forces Agreement.

In order to be prepared in the event of the ratification by the United States of the NATO Status of Forces Agreement, the Departments of State and Defense have drafted the following documents which are enclosed: (1) a note from the Ambassador to the Japanese Minister of Foreign Affairs, (2) proposals for changes in the Japanese draft Protocol to amend Article XVII and (3) proposals for official minutes regarding the Protocol. Any comments of the Embassy or the Command with respect to these documents should be telegraphed to the Department as soon as possible.

The Department is sending in a separate instruction recommendations for discussions with the Commonwealth representatives in Tokyo regarding the negotiation of the criminal jurisdiction provisions of the United Nations forces

agreement.

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agreement. It should be made clear to the Japanese in some appropriate way from the commencement of the negotiations for revision of Article XVII of the Administrative Agreement that it is understood that the same criminal jurisdiction arrangements that are made applicable to United States forces including any formal or informal understandings with respect to procedures and to the waiver of the primary right to exercise jurisdiction - will also be made applicable to the United Nations forces in Japan.

The Department believes that there are only two of the United States proposals which may cause difficulty. The first is the proposal to add to the Japanese draft Protocol a paragraph concerning suspension in the event of hostilities. The second involves the arrangement for the waiver by Japan of its primary right to exercise jurisdiction.

With reference to the proposed paragraph concerning suspension, the Embassy may wish to point out to the Japanese that the paragraph does not enable the United States, by unilateral action, to reestablish exclusive jurisdiction arrangements in the event of hostilities. Any revision of criminal jurisdiction arrangements would have to be made by agreement between the United States and Japan. The United States has declared its intention in the event of hostilities in the NATO countries to take steps to suspend Article VII of the NATO status of forces agreement so far as it is concerned and to seek exclusive jurisdiction in the NATO countries.

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The proposed paragraph concerning suspension describes the circumstances under which the right of suspension may be exercised as "hostilities in the Japan area". This phrase includes, of course, armed attack upon Japan. It is also broad enough to include hostilities in the Ryukyu and other areas near to Japan. The Embassy may assure the Japanese that the United States does not intend to seek suspension of concurrent jurisdiction arrangements in Japan while hostilities are continuing in Korea. It is assumed that concurrent jurisdiction arrangements will be implemented in such a way as to avoid any interference with the conduct of hostilities in Korea.

The phrase "Japan area" appears in Article IV of the Security Treaty and in Article XXIV of the Administrative Agreement. The Department would prefer to avoid any exact definition of the phrase and to leave its meaning to be worked out in the course of time whenever specific issues are raised.

It is desired that the Embassy seek the maximum waiver which can be obtained of the primary jurisdiction available to the Japanese Government under paragraph 3(c) of the draft Protocol. Preferably this should be public and take the form of a general waiver on the government level. It is recognized, however, that the approach used to the Japanese Government must not be such as would react unfavorably upon general United States-Japanese relations. It is further recognized that any effective approach to obtaining such a waiver must take into consideration the extreme sensitivity of the Japanese to the exercise by any nation of extraterritoriality. Therefore, it is requested that

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the Embassy explore with the Japanese authorities the most effective method of obtaining a maximum waiver of primary jurisdiction. If a general waiver seems unobtainable, it is possible that a qualified waiver may be used to secure for United States personnel substantial immunity from Japanese jurisdiction. This might take the form of the minute proposed Re para. 3(4) of the Protocol.

The United States is planning to seek arrangements with the NATO countries for the maximum appropriate waiver of local criminal jurisdiction without bearing unfavorably on general relations between the United States and the country concerned. United States Ambassadors in two NATO countries have already been authorized to seek waiver arrangements. The arrangements will be kept confidential. Because disclosure of the United States policy would prejudice general relations with the NATO countries and affect negotiations concerning not only the status of forces but also the stationing of troops in Europe, it has been agreed that the only public reference to the policy "should be along lines that the United States is confident that operating arrangements based on good relations between governments and between our military authorities and local authorities abroad will provide in fact an even greater measure of protection than the satisfactory legal quantities established by the NATO Status of Forces Agreement." Therefore, Japanese officials should be advised only in terms of the foregoing quotation unless the Embassy is convinced that a

disclosure

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disclosure of the full data will be held strictly confidential by the Japanese officials concerned.

The Japanese Government may be unwilling to make a waiver of the type requested. In that event it may be possible to work out a waiver declaration along the lines of the Japanese proposal of September 1952. That proposal contemplated that Japan would normally waive jurisdiction over minor offences, but would normally exercise jurisdiction over major offences, such as murder, arson, assault resulting in death, robbery and rape. If such an arrangement were set forth in the minutes, the Japanese might be willing to give oral assurances that they will normally waive jurisdiction even over major offences.

It is preferable that the waiver arrangement be unclassified, if possible. If a classified arrangement is made, the Japanese public will infer from the treatment of future cases that there is an arrangement which has not been disclosed.

In keeping with our policy with respect to the NATO countries, the aim of the Embassy should be to secure a waiver arrangement as authoritative and extensive as possible without bearing unfavorably on general United States-Japanese relations. The waiver proposal of the United States should not be presented as a demand, but as a request. The Embassy should use only such persuasion as would not involve United States bargaining strength in other matters.

Enclosures:

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Enclosures:

- (1) Draft note from Ambassador to Japanese Foreign Minister.
- (2) Draft United States proposals for changes in Japanese draft Protocol.
- (3) Draft United States proposals for official minutes regarding Protocol.

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DRAFT NOTE FROM UNITED STATES AMBASSADOR  
TO JAPANESE MINISTER OF FOREIGN AFFAIRS

Excellency:

I have the honor to refer to your note of April 14, 1953 with which were enclosed a draft of a protocol on criminal jurisdiction and a draft of official minutes regarding the protocol which Japan proposes to conclude with the United States upon the coming into force of the agreement between the Parties to the North Atlantic Treaty regarding the status of their forces.

On \_\_\_\_\_ the United States Senate gave its advice and consent to the ratification of the NATO Status of Forces Agreement.

Article XVIII of the agreement provides that thirty days after four signatory states have deposited their instruments of ratification the agreement shall come into force between them. France, Norway and Belgium have already deposited their ratifications. Consequently the NATO Status of Forces Agreement will come into force with respect to the United States thirty days after the deposit of the United States ratification.

My Government is prepared to use the draft of the protocol enclosed with your note of April 14, 1953 as the basis for negotiation of an agreement on criminal jurisdiction to be concluded immediately upon the coming into force of the NATO agreement. Proposals of my Government for changes in the draft protocol are enclosed. With respect to the official minutes my  
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Government has prepared a draft which incorporates all except one of the Japanese proposals for the official minutes and which includes a number of additional proposals. My Government suggests that its draft, which is enclosed, be used as the basis for reaching an agreement on the official minutes.

In this connection my Government wishes to make clear its belief that the agreement ultimately concluded between the United States and Japan and the official minutes accompanying the agreement should also be made applicable to the United Nations forces in Japan through the agreement now under negotiation concerning the status of those forces.

Enclosures:

1. US proposals for changes in the draft protocol.
2. US draft of agreed official minutes regarding the protocol.

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UNITED STATES PROPOSALS FOR CHANGES IN THE DRAFT PROTOCOL  
TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT  
PROPOSED BY THE JAPANESE GOVERNMENT ON APRIL 14, 1953

- (1) In the third clause of the preamble the word "of" should be inserted between the words, "existing provisions" and the words "Article XVII", and the ending of the clause should be changed to read". . . shall be abrogated and the following provisions shall be substituted:"
- (2) In paragraphs 1 and 2, the order of the (a) and (b) clauses should be reversed to conform with the NATO agreement.
- (3) In paragraph 1 and subsequent paragraphs the phrase "of the civilian component thereof" should be changed to read "the civilian component" to conform with other Articles of the Administrative Agreement.
- (4) In clause (a) of paragraph 3, the phrase "a member of the United States armed forces, or of the civilian component thereof" should be changed to read "a member of the United States armed forces, the civilian component or one of their dependents".

COMMENT: The above proposal would differ from the Japanese proposal only to the extent of giving the United States military authorities the primary right to exercise jurisdiction over dependents for offences solely against United States

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property or the person or property of another member of the United States armed forces, the civilian component or a dependent.

- (5) In paragraph 5(c) the words "a suspect member" should be changed to read "an accused member" to conform with the NATO agreement.
- (6) In paragraph 9(e) the words "defense counsel" should be changed to read "legal representation" in 2 places to conform with NATO.
- (7) The following paragraph should be added as Paragraph 11 of the draft Protocol:

"11. In the event of hostilities in the Japan area either Japan or the United States shall have the right, by giving 60 days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, Japan and the United States shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended."

COMMENT: The above paragraph is similar to Article XV of the NATO Status of Forces Agreement, which is part of the criminal jurisdiction provisions of the NATO agreement. Consequently, in accordance with the first paragraph of Article XVII of the Administrative Agreement, the above paragraph should be included in an agreement with Japan on criminal jurisdiction.

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OFFICIAL MINUTES REGARDING  
PROTOCOL TO AMEND ARTICLE XVII  
OF THE ADMINISTRATIVE AGREEMENT

Re Paragraph 1(b) and Paragraph 2(b)

The scope of persons subject to the military law of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re Paragraph 2(c)

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re Paragraph 3(b)

It is understood that as part of the normal cooperation between allies, the authorities of a force will decide as to whether or not an offense has been committed in the course of official duty.

Re Paragraph 3(c)

It is understood that the Japanese Government does not desire to exercise its primary right of jurisdiction over members of the United States Armed Forces, the civilian component or their dependents except in cases considered to be of particular importance

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to Japan. Accordingly, instructions will be communicated to the appropriate Japanese civil authorities together with appropriate directions to that effect.

In cases in which members of the United States Armed Forces, civilian component or their dependents are alleged to have committed offenses with respect to which Japan has the primary right to exercise jurisdiction, the United States military authorities shall promptly notify the appropriate Japanese authorities of such arrest. Absence of notification to the United States military authorities within \_\_\_\_ days of the receipt by the Japanese authorities of notification of the arrest shall be considered as notice that Japanese authorities do not wish to exercise jurisdiction.

In cases in which Japanese authorities have arrested members of the United States Armed Forces, civilian component or their dependents for offenses over which Japan has the primary right to exercise jurisdiction, the Japanese authorities shall either deliver the persons to the United States military authorities for trial within \_\_\_\_ days or shall inform the United States military authorities within the same period that they have been

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directed to exercise jurisdiction in the case.

Trials of cases in which the Japanese authorities have waived primary jurisdiction, and trials of cases involving offences of paragraph 3(a)(ii) committed against the state or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offences are alleged to have taken place unless other arrangements are mutually agreed. Representatives of Japanese authorities may be present at such trials.

RE Paragraph 10(a) and 10(b).

It is understood that the United States authorities will normally make all arrests within facilities and areas in use by the United States Armed Forces. Any person subject to the jurisdiction of Japan and arrested in any such facility or area will, upon request, be turned over to the Japanese authorities.

The United States authorities may, under due process of law, arrest in the vicinity of such a facility or area any person in the commission or attempted commission of an offence against the security of that facility or area. Any such person not subject to the jurisdiction of the United States Armed Forces shall immediately be turned over to Japanese authorities.

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It is understood that the Japanese authorities will normally not exercise the right of search or seizure with respect to any persons or property within facilities and areas in use by the United States Armed Forces or with respect to property of the United States Armed Forces wherever situated. At the request of Japanese authorities the United States authorities will undertake, within the limits of their authority, to make such search and seizure and inform the Japanese authorities as to the results thereof. In the event of a judgment concerning such property, except property owned or utilized by the United States Government, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

Re Paragraph II

The United States declares its intention, in the event of hostilities in the Japan area, other than the present hostilities in Korea, to seek exclusive jurisdiction over its forces in Japan.

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